

Before the
COPYRIGHT ROYALTY BOARD
United States Copyright Office
Washington, DC

In re

Distribution of Digital Audio Recording
Royalty Funds

CONSOLIDATED
Docket No. 2008-3 CRB DD
(2007-2011 SRF)

MOTION TO REJECT
EUGENE CURRY’S LATE PETITION TO PARTICIPATE

Pursuant to Section 351.1(c) and in response to Eugene Curry’s (“Curry”) defective filing dated April 24, 2019, the Alliance of Artists and Recording Companies (“AARC”) hereby files its motion to reject Curry’s filing entitled “Petition to Participate in the Consolidated DART Sound Recording Fund.” 37 C.F.R. § 351.1(c) (2019); Petition to Participate in the Consolidated DART Sound Recording Fund, In the Matter of Distribution of Digital Audio Recording Funds, Docket No. CONSOLIDATED 2008-3 CRB-DD (2007-2011 SRF) (Apr. 24, 2019) (“Curry Late PTP”).

AARC respectfully requests that the Curry Late PTP be rejected because it did not include a description of “the petitioner’s interest in the subject matter of th[is] proceeding.” 17 U.S.C. § 803(b)(1)(B) (2017); see also 37 C.F.R. § 351.1(b)(2)(i)(C), (c).

BACKGROUND

On December 22, 2018, Curry filed his first defective petition titled “Petition to Participate in the Consolidated Proceeding in the Distribution of Funds Remaining in Sound Recording Sub-funds” in this consolidated proceeding. Petition to Participate in the Consolidated Proceeding in the Distribution of Funds Remaining in Sound Recording Sub-funds, In the Matter

of Distribution of Digital Audio Recording Royalty Funds, Docket No. CONSOLIDATED 2008-3 CRB DD (Dec. 22, 2018).

On February 1, 2019, AARC filed the “Motion to Reject Eugene Curry’s Defective Filing.” Motion to Reject Eugene Curry’s Defective Filing, In the Matter of Distribution of Digital Audio Recording Royalty Funds, Docket No. CONSOLIDATED 2008-3 CRB DD (Feb. 1, 2019). AARC’s motion was granted by the Copyright Royalty Board (“CRB”) in its order dated February 27, 2019, which rejected Curry’s defective filing and dismissed Curry from the proceeding. Order Granting AARC Motion to Reject Eugene Curry’s Defective Filing and Dismissing Eugene Curry, In the Matter of Distribution of Digital Audio Recording Royalty Funds, CONSOLIDATED Docket No. 2008-3 CRB DD (2007-2011 SRF) (Feb. 27, 2019) (“Order Dismissing Curry”). In its dismissal, the CRB advised Curry that he could “promptly . . . file a motion seeking leave to file a late Petition to Participate and stating reasons (supported by facts and arguments)” to support his request to file a late petition. Id. at 4.

On April 19, 2019, the CRB issued an order, granting Curry leave to file a late Petition to Participate based on Curry’s motion on March 23, 2019 as well as the exhibit refiled on April 4, 2019. Order Granting Eugene Curry Leave to File Late Petition to Participate, In the Matter of Distribution Digital Audio Recording Royalty Funds, Docket No. CONSOLIDATED 2008-3 CRB DD (2007-2011 SRF) (Apr. 19, 2019) (“Order Granting Curry Leave”); Motion to Reconsider AARC Proposed Order for Eugene Curry Dismissal Due to Extraordinary Circumstances, In the Matter of Distribution of Digital Audio Recording Funds, Docket No. CONSOLIDATED 2008-3 CRB-DD (2007-2011 SRF) (March 23, 2019); see also Order Acknowledging Receipt of Responsive Exhibit From Eugene Curry and Authorizing Response, In the Matter of Distribution Digital Audio Recording Royalty Funds, Docket No.

CONSOLIDATED 2008-3 CRB DD (2007-2011 SRF) (Apr. 4, 2019) (acknowledging that Curry refiled the exhibit on April 4, 2019).¹ In the Order Granting Curry Leave, the CRB specifically directed Curry to comply with 37 C.F.R. § 351(b)(2)(i) including the requirement to describe “the petitioner’s significant interest” in the proceeding and set the deadline of April 26, 2019, for filing the late Petition to Participate. Order Granting Curry Leave at 2; 37 C.F.R. § 351.1(b)(2)(i).

On April 24, 2019, pursuant to the CRB’s order of April 19, 2019, Curry filed his late Petition to Participate, which contains the following statements in support of his “significant interest” in this consolidated proceeding:

The *performance rights* in the musical embodiment for “Somebody Loves You Baby (You Know Who It Is) Grammy award winning song /sic/. The Sound recording fund is for the owners of such rights. There are two. I am the Copyright Owner of the musical embodiment *performance rights* being that I *created and performed all musical instruments and sounds*. AARC represents the labels who own the second right. That’s the right of the artist who performed the vocals who on this song is Patti LaBelle. So based on these facts aarc /sic/ can only get at the most half not a whole.

Curry Late PTP at 1 (emphasis added).

LEGAL DISCUSSION

Section 803(b)(2)(C) of the Copyright Act provides that a party can participate in a CRB proceeding “only if” the CRB has not determined that the person “lacks a significant interest.” 17 U.S.C. § 803(b)(2)(C). The CRB implemented this statutory requirement in subsections (b) and

¹ AARC filed oppositions to Curry’s motion seeking leave to file a late petition on March 20, 2019, March 28, 2019 and April 8, 2019 respectively. Opposition to Eugene Curry’s Motion for Leave to File a Late Petition to Participate, In the Matter of Distribution of Digital Audio Recording Royalty Funds, Docket No. CONSOLIDATED 2008-3 CRB DD (2007-2011 SRF) (Mar. 20, 2019); Opposition to Eugene Curry’s Motion to Reconsider, In the Matter of Distribution of Digital Audio Recording Royalty Funds, Docket No. CONSOLIDATED 2008-3 CRB DD (2007-2011 SRF) (Mar. 28, 2019); Response to Eugene Curry’s Exhibit, In the Matter of Distribution of Digital Audio Recording Royalty Funds, Docket No. CONSOLIDATED 2008-3 CRB DD (2007-2011 SRF) (Apr. 8, 2019).

(c) of Section 351.1 of its regulations. 37 C.F.R. § 351.1(b), (c). Section 351.1(c) declares that a petition will not be accepted if the filer lacks a significant interest. Id. § 351.1(c).

The description of filer’s interest in the Petition to Participate, as required in both Section 803(b)(1)(B) of the Copyright Act and Section 351.1(b)(2)(i)(C) of the CRB regulations, plays a critical role in the CRB’s ability to “determine whether that party has a sufficient interest to participate in a proceeding.” Order Dismissing Curry at 3; 17 U.S.C. § 803(b)(1)(B), (b)(2)(C); 37 C.F.R. § 351.1(b)(2)(i)(C), (c). A petitioner’s failure to describe his/her significant interest in the proceeding is, therefore, a fatal flaw requiring the CRB’s rejection of the Petition to Participate. See, e.g., Order Dismissing Curry; Ex. A, Order Dismissing Petition to Participate of David Powell, In the Matter of Determination of Royalty Rates and Terms for Performance or Display of Nondramatic Musical Works and Pictorial, Graphic, and Sculptural Works by Public Broadcasting Entities (PB III), Docket No. 16-CRB-0002 PBR (2018-2022) (Aug. 16, 2016) (dismissing the Petition to Participate because neither document supplied by the party showed that he had “any substantive interest” in the proceeding).

A party has an interest in a distribution proceeding, when such party is entitled to receive a share of the royalties in the fund or subfund, which is the subject of the proceeding. See Procedural Regulations for the Copyright Royalty Board, 70 Fed. Reg. 30,901, 30,902 (May 31, 2005) (emphasis added) (“In past practice, the Copyright Office has required a putative participant to *show some financial stake in the outcome of the proceeding* in order to present a ‘significant interest.’”). Pursuant to the Audio Home Recording Act of 1992 (“AHRA”), to be entitled to a share of the DART Sound Recordings Fund (“SRF”)/Copyright Owners Subfund royalties, the party must be “the owner of the exclusive right under section 106(1) of this title *to reproduce a sound recording* of a musical work that has been embodied in a digital musical

recording . . .” 17 U.S.C. §§ 106(1), 1001(7)(A), 1006(b)(1) (2017) (emphasis added). Therefore, a filer’s Petition to Participate in a DART SRF/Copyright Owners Subfund distribution proceeding must include facts establishing that such party owns the *reproduction right*, in a sound recording of a musical work.

ARGUMENT

The Curry Late PTP Should Be Rejected Because It Did Not Establish Curry’s Significant Interest In The DART SRF/Copyright Owners Subfund Distribution Proceeding

The Curry Late PTP is defective and should be rejected because Curry failed to describe his “significant interest” in the distribution of the 2008 and 2010 DART SRF/Copyright Owners Subfunds, which are the only two subfunds, in this consolidated proceeding, for which he has filed a timely claim and petitioned to participate. 17 U.S.C. § 803 (b)(1)(B), (b)(2)(C); 37 C.F.R. § 351.1(b)(2)(i)(C), (c); Order Granting Curry Leave at 2; Curry Late PTP at 1. Specifically, Curry failed to establish that he is the owner of the reproduction right of a sound recording. 17 U.S.C. §§ 1001(7)(A), 1006(b)(1).

In his defective filing, Curry claimed to be the owner of the “performance rights” in the “musical embodiment” and incorrectly stated that the SRF “is for the owners of [performance] rights.” Curry Late PTP at 1. However, performance rights² do not fall within the purview of the AHRA. 17 U.S.C. §§ 106(4), (6), 1001-1010 (2017). And so, a DART SRF/Copyright Owners Subfund distribution proceeding is not the proper venue for litigating matters related to performance rights royalties.

² The performance rights of composers, songwriters, music publishers, and lyricists are collected and distributed by organizations such as ASCAP and BMI. See, e.g., ASCAP, <https://www.ascap.com/> (last visited on April 25, 2019); BMI, <https://www.bmi.com/about> (last visited on April 25, 2019). Statutory digital performance rights of featured artist and sound recording copyright owners are collected and distributed by SoundExchange. See SoundExchange, <https://www.soundexchange.com/artist-copyright-owner/digital-royalties/> (last visited on Apr. 25, 2019).

As further proof of his significant interest in this DART SRF/Copyright Owners Subfund distribution proceeding, Curry claimed ownership of the performance rights of the title, “Somebody Loves You Baby (You Know Who It Is)”, because “he created and performed all musical instruments and sounds” in it. Curry Late PTP at 1. Curry’s statement established that he might have an interest in the underlying musical works and/or as a performer, whether featured or non-featured.³ However, a DART SRF/Copyright Owners Subfund distribution proceeding is not the proper venue for litigating these matters either.

AARC’s research of the sound recording title, “Somebody Loves You Baby (You Know Who It Is),” in the All Music Guide (“AMG”)⁴ online data, the U.S. Copyright Office registration records, and prior DART proceedings records, supports Curry’s claim of copyright ownership in the underlying musical work. See Ex. B, Somebody Loves You Baby (You Know Who It Is) (AMG) (showing the title was composed by Curry and “Bunny Sigler”); see also Ex. C, Burnin’ (AMG) (crediting Curry as “composer, keyboard, producer” for the album listing Somebody Loves You Baby (You Know Who It Is) as one of the soundtracks); see also Ex. D, Copyright Registration PA0000582074 (stating “Authorship on Application: music: Eugene Curry; words: Walter Sigler”⁵); see also Ex. F, Order Denying Motion for Rehearing, In the Matter of Distribution of 2013 Digital Audio Recording Royalties Funds, Docket No. 14-CRB-

³ Non-featured performers’ DART royalties are not subject to distribution proceedings. Instead, they are “managed by an independent administrator.” 17 U.S.C. § 1006((b)(1). Currently, the independent administrator is The AFM & SAG-AFTRA Intellectual Property Rights Distribution Fund. See AFM & SAG-AFTRA, <https://www.afmsagaftrafund.org/about.php> (last visited on Apr. 26, 2019).

⁴ AMG was founded in 1991 to help consumers navigate the increasingly complex world of recorded music and discover the best recordings. The website contains information on all genres and styles of music – ranging from the most commercially popular to the most obscure – and is widely used by consumers and industry professionals alike. See AMG, www.allmusic.com (last visited on Apr. 25, 2019).

⁵ The PA Copyright Registration form is used to register the underlying musical composition. The PA0000582074 Certificate of Registration supplied by Curry, in another proceeding, indicates that an amendment to the certification was made, by telephone, to add another copyright claimant “Walter Sigler,” as the author of the lyrics. Ex. E, Certificate of Registration of PA0000582074 at 1-2. Therefore, it appears that Curry may not be the owner of the entire musical works portion of the DART royalties, as he only authored the music portion of the song.

0006 DART SR(CO/FA) (2013) at 2 (finding that the exhibits which Curry used to support his claims to the Sound Recordings Fund, were “apparently unrelated to the sound recording, but rather payable for the underlying published musical work.”) (“Order Denying Motion for Rehearing”); see also Ex. G, Testimony of Cynthia Oliver, In the Matter of Distribution of 2013 Digital Audio Recording Royalty Funds, Docket No. 14-CRB-0006 DART SR(CO/FA) 2013 (Feb. 8, 2016) (“Universal Music Group has been paying songwriter/publisher copyright royalties to Eugene Curry’s publishing company, TAJAI Music, Inc.”).

Songwriters are not considered “interested copyright part[ies]” in DART SRF/Copyright Owner Subfund proceedings. 17 U.S.C. §§ 1001(7)(A), 1006(b)(1). They are considered “interested copyright part[ies]” in DART Musical Works distribution proceedings. Id. §§ 1001(7)(B), 1006(b)(2). As explained by the CRB, “[m]usic writers and publishers receive royalties only from the musical works fund.” Order Denying Motion for Rehearing at 2.

The Curry Late PTP reflected a profound misunderstanding as to the fund in which Curry, as a songwriter, is an interested party and as to which particular copyright the AHRA covers. None of the statements provided in his defective filing established that Curry owns the reproduction right of a sound recording, which is required to establish a “significant interest” in a DART SRF/Copyright Owners Subfund distribution proceeding. Since a failure to demonstrate, in a Petition to Participate, a “significant interest” in the proceeding is a fatal defect, the Curry Late PTP should be rejected pursuant to statutory and regulatory requirements. 17 U.S.C. § 803 (b)(2)(C); 37 C.F.R. § 351.1 (c).

WHEREFORE, in view of the foregoing, AARC respectfully requests that the CRB reject the Curry Late PTP and dismiss Curry from this consolidated proceeding.

Respectfully submitted,
On Behalf of AARC

/s/Linda R. Bocchi, Esq.

Linda R. Bocchi, Esq.

DC BAR# 338012

VA BAR# 77599

Executive Director

Alliance of Artists and Recording Companies

700 N. Fairfax Street, Suite 601

Alexandria, VA 22314

(703) 535-8101 (phone)

(703) 535-8105(facsimile)

lbocchi@aacroyalties.com

April 29, 2019

Proof of Delivery

I hereby certify that on Monday, April 29, 2019 I provided a true and correct copy of the Motion to Reject Eugene Curry's Late Petition to Participate to the following:

Kelly, Herman, represented by HERMAN KELLY MR served via Electronic Service at hermankelly@att.net

Curry, Eugene, represented by Eugene Curry Mr. served via Electronic Service at lambchopsmusic@voicenet.com

Signed: /s/ Linda R Bocchi